Supreme Court, U.S.
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No. 92-1946

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WARD PETROLEUM CORPORATION, VERLAN W. HARRELL, NORMAN R. GELPHMAN, THOMAS G. WYGANT, DAVID M. PULLING, JAMES KUHLMAN, T. MICHAEL COCHERES, GILBERT TOMPSON, WHITBAR ENERGY LIMITED PARTNERSHIP, LARRY E. BOYD, AND VIERSEN OIL AND GAS COMPANY,

Petitioners,

v.

THE OKLAHOMA CORPORATION COMMISSION, THE LOUISIANA LAND AND EXPLORATION COMPANY, MCFARLANE COMPANY, AND TRIMBLE PROPERTIES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF OKLAHOMA, DIVISION III

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July 1, 1993

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RULE 29.1 STATEMENT

As required by Rule 29.1 of this Court, the corporate Respondent, The Louisiana Land and Exploration Company, lists the following parent companies, subsidiaries, or affiliates:

A. Respondent, The Louisiana Land and Exploration Company, has no parent corporation.

B. Following are the subsidiaries of such Respondent:

1. Inexco Oil Company
2. Wilson Brothers Drilling Company
3. LL&E Properties, Inc.
4. Westport Utilities Systems Co., Inc.
5. LL&E Algeria, Ltd.
6. LL&E Australia Pty. Limited
7. LL&E Australia (Offshore) Pty. Limited
8. LL&E, Canada Holdings
9. LL&E, Ltd.
10. LL&E Colombia, Inc.
11. LL&E Egypt, Inc.
12. LL&E Erave Pty. Ltd.
13. LL&E Espana, Inc.
14. LL&E (Europe-Africa-Middle East) Inc.
15. LL&E France, S.A.
16. LL&E Gas Marketing, Inc.
17. Gippsland Pty. Ltd.
18. LL&E Holland Ltd.
19. LL&E, Inc.
20. LL&E Indonesia, Ltd.
21. LL&E International, Inc.
22. LL&E Mining, Inc.
23. LL&E (Netherlands) Inc.
24. Maralou Netherlands Partnership[1]
25. CLAM Petroleum Company
26. LL&E Netherlands North Seal Ltd.
27. LL&E Netherlands Petroleum Company
28. LL&E Overseas Petroleum Ltd.
29. LL&E Petroleum Marketing, Inc.

30. LL&E Petroleum Terminals, Inc.
31. LL&E Petroleum Resources International, Inc.
32. LL&E Pipeline Corporation
33. LL&E PNG, Pty. Ltd.
34. LL&E Sepik Pty. Ltd.
35. LL&E Suez, Inc.
36. LL&E Timor Sea Pty. Ltd.
37. LL&E Tunisia, Inc.
38. LL&E (U.K.) Inc.
39. LL&E Yemen, Ltd.
40. LLOXY Holdings, Inc.
41. LLOXY Production Financing Company, Inc.
42. Molokai California Limited
43. Kaluakoi Corporation
44. South Louisiana Land Company, Ltd.[2]
45. Swamplands, Inc.[2]
46. White Pine Leasing, Inc.

[1] Unconsolidated affiliate accounted for under the equity method.
[2] Unconsolidated subsidiaries.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF OKLAHOMA, DIVISION III

This matter comes before the Court on Petition of Ward Petroleum Corporation, et al. ("Petitioners") for Writ of Certiorari served upon The Louisiana Land and Exploration Company ("Respondent") on June 3, 1993. In opposition thereto, Respondent sets forth the pertinent facts and controlling authorities, demonstrating that no reasons exist herein to grant the Petition.

RESPONSE TO PETITIONERS' STATEMENT OF THE CASE

I. The Oklahoma Oil And Gas Conservation Laws

The Petitioners have included in their Petition for a Writ of Certiorari a Statement of the Case which

includes an unsupported statement of the rationale behind the Oil and Gas Conservation Laws of the State of Oklahoma. There is nothing in the record of this case to base such a statement upon.

The valid creation of drilling and spacing units by the Oklahoma Corporation Commission depends upon a number of factors, only one of which relates to the ability of a well to drain from the geological reservoir. Drilling and spacing units are established within geological common sources of supply.[1] The initial order establishing a common source of supply creates a certain size of unit, generally varying from 2-1/2 acres to 640 acres, based upon a finding relating to whether oil or gas will be the predominant hydrocarbon produced, and preliminary expert estimate of the amount of acres to be drained by one well within the common source of supply.[2] It is generally recognized that drill-

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[1] Okla. Stat. Ann. tit. 52, Section 86.1(c) (1981) provides as follows:

> The term "common source of supply" shall comprise and include that area which is underlaid or which, from geological or other scientific data, or from drilling operations, or other evidence, appears to be underlaid, by a common accumulation of oil or gas or both; provided, that, if any such area is underlaid, or appears from geological or other scientific data, or from drilling operations, or other evidence, to be underlaid by more than one common accumulation of oil or gas or both, separated from each other by a strata of earth and not connected with each other, then such area, as to each said common accumulation of oil or gas, or both, shall be deemed a separate common source of supply.

[2] title 52, Section 87.1(c) provides that the following facts are material to creation of a drilling and spacing unit:

> (1) The lands embraced in the actual or prospective common source of supply;
>
> (2) The plan of well spacing then being employed or contemplated in said common source of supply;
>
> (3) The depth at which production from said common source of supply has been or is expected to be found;
>
> (4) The nature and character of the producing or prospective producing formation or fomations;
>
> (5) Any other relevant geological or scientific data.

ing and spacing units in Oklahoma are prospectively created.[3] In other words, the drilling and spacing unit is established prior to the drilling, completion and analysis of the initial unit well.[4]

If, after the common source of supply has been defined by the Oklahoma Corporation Commission, the drilling of wells establishes a need to enlarge or extend the common source of supply, the Oil and Gas Conservation Laws authorize an interested party to apply for an expansion of the boundaries thereof to include adjacent lands.[5] These extensions of the common source of supply are no longer subject to a finding as to the ability of a well to drain. The statute dictates that the drilling and spacing units covering the expanded area be of the same size and shape as under the initial spacing order, unless certain facts are proven to justify otherwise.[6]

No matter the size of the drilling and spacing unit established within a common source of supply, the spacing order allows only one well to be drilled and produced thereon. Each spacing order carries with it the implication that the one authorized unit well will adequately develop the unit. Until there has been a change in the conditions assumed by the Oklahoma

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[3] See Id., at Section 87.1(c)(1).

[4] This fact is implicitly recognized by the Oklahoma courts in decisions relating to the pooling authority granted under title 52, Section 87.1(e). In *Amoco Production Company v. Corporation Commission of Oklahoma*, 751 P.2d 203 (Okla.App. 1986) (Adopted by the Supreme Court of Oklahoma February 9, 1988), the Court found that original elections under pooling orders are sometimes based upon lack of information. The Court was unsympathetic to an owner who chose not to risk money in the unit well, but who, after discovering information generated at the expense of others in its drilling, wanted to participate in subsequent wells.

[5] title 52, Section 87.1(a).

[6] Id.

Corporation Commission to exist on the date a drilling and spacing unit is created, or until the knowledge of such conditions changes, the unit is to be developed by the one unit well.[7]

The "pooling" referred to by the Petitioners is authorized by the Oil and Gas Conservation Laws of Oklahoma.[8] Under Oklahoma law, any party owning a right to drill within the drilling and spacing unit, can apply for a pooling order. Neither the Oil and Gas Conservation Law, nor the Rules of the Corporation Commission of Oklahoma, require that a well location be specified within the application.[9] As a practical matter, applications for pooling never mention location. The application in Cause CD No. 108567, the Cause which resulted in the original pooling order in controversy in this case, did not specify any location for the unit well.

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[7] In fact, title 52, Section 87.1(c) specifically limits the density of well spacing by providing as follows:

> Subject to other provisions of this act, the order establishing such drilling and spacing unit shall direct that no more than one (1) well shall thereafter be produced from the common source of supply on any unit so established, and that the well permitted on that unit shall be drilled at the location thereon as prescribed by the Commission . . .

[8] title 52, Section 87.1(e) states that when two or more owners within a drilling unit have not agreed to pool their interests and a unit well has been proposed, or drilled, the Corporation Commission of Oklahoma shall "upon a proper application therefor and a hearing thereon, require such owners to pool and develop their lands in the spacing unit as a unit."

[9] See title 52, 87.1(e). The Rules of Practice of the Oklahoma Corporation Commission require only that the pooling application identify the applicant; provide the legal description of the drilling and spacing unit; list the case number assigned to the application; provide the name and address of each respondent; allege certain jurisdictional facts; cite the legal authority for Commission jurisdiction of the matter; state that the applicant cannot reach agreement with the respondents; and, identify the proposed unit operator. See Oklahoma Corporation Commission Rules of Practice, Rule Nos. 8-1 and 8-3.

The Oklahoma Corporation Commission is authorized to enter pooling orders only upon terms which are just and reasonable.[10] The pooling orders of the Commission have evolved into instruments which offer alternatives to participation in the risk of drilling the unit well. Those alternatives generally include either cash bonus and royalty interest, or no cash but an increased royalty interest. In either event, the party electing from such alternatives will continue to share in revenues. The extent of sharing will depend upon the alternative selected, and will be less than the share realized by participating parties. However, the party's reduced share results from its desire not to assume the financial risks taken by the participating owners.

The Petitioners contend in their Statement of the Case that "beginning in September of 1983 and continuing until early May, there was controversy at the Commission and among oil and gas industry members regarding the scope of forced pooling orders." The foundation for this argument is the issuance by the Oklahoma Corporation Commission of what the Petitioners call "Statement of Policy No. 45." Based upon the alleged reliance of *some* of the Petitioners upon that policy, the Petitioners assert a violation of the right to due process of *all* Petitioners.[11]

II. The Original Pooling Order Covering The Drilling And Spacing Unit

The Petitioners' Statement of the Case notes the entry by the Commission of Order No. 260474 ("the

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[10] title 52, Section 87.1(e)

[11] Although the Petitioners' Statement of the Case would lead this court to believe that *all* of the named Petitioners relied upon Statement of Policy No. 45, there is conspicuously absent from the record below any evidence of such reliance by Viersen Oil and Gas Company, Norman R. Gelphman, Larry E. Boyd and Whitbar Energy Limited Partnership. Moreover, Verlan Harrell did not even own an interest in Section 23 on the date of Order No. 260474.

original pooling order") issued in Cause CD No. 108567, an application by Inexco Oil Company (Respondent's predecessor in title) for an adjudication of rights and equities in Section 23, Township 12-North, Range 14 West, Custer County, Oklahoma. That tract was a 640 acre drilling and spacing unit for a number of common sources of supply. There were no wells in Section 23 on the date of the original pooling order, and only by taking the financial risks associated with drilling could parties generate geological information.[12]

Order No. 260474, the only valid and final pooling order covering Section 23, designated Inexco Oil Company as unit operator. A party who chose to participate in the risk of the initial unit well was required to pay to Inexco that party's share of the cost of such operation. The order's reference to the unit well was appropriate given the fact that only one unit well was authorized. The Oklahoma Corporation Commission could hardly require that participating owners pay to Inexco monies associated with wells which might be necessary in the future.

The Petitioners correctly quote the Notice of Hearing which preceded the entry of the original pooling order. That Notice of Hearing was issued by the Commission pursuant to its procedural rules. However, the Petitioners erroneously contend that Statement of Policy No. 45 was a "third notice in Cause CD No. 108567." There is absolutely no justification for that claim, and Petitioners' contention is a misrepresentation of facts. Policy No. 45 was simply a three-page document signed by the Commissioners and laid

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[12] See *Amoco Production Company v. Corporation Commission of Oklahoma*, 751 P.2d at 207.

on a table in a hall. (R. at 342.)[13] It was not preceded by any notice of rulemaking. (R. at 364-365; 374.) In fact, there was no notice of any kind given prior to its mysterious appearance on the table. (R. at 363; 374.) That document does not have any reference to what was its intended effect upon proceedings heard prior to May 3, 1984, the date it was signed by the Commissioners. (R. at 376.)

Cause CD No. 108567 was heard on April 20, 1984, at which time representatives of Inexco Oil Company ("Inexco"), Ward Petroleum Corporation ("Ward") and Viersen Oil and Gas Company ("Viersen") appeared. Viersen owned an unleased mineral interest in Section 23. Ward owned an oil and gas leasehold interest in that section. Ward protested the Cause, citing fair market value as its only objection. (R. at 830 — Report of the Trial Examiner.) A Report of the Trial Examiner recommended the application on the terms testified to by Inexco. Ward initially filed, but then withdrew, exceptions to that Report. (R. at 830.)

Order No. 260474 was issued by the Commission on June 6, 1984, providing a fifteen (15) day election period. It had no reference to Policy No. 45. (R. at 830 — Order No. 260474.) No appeal was taken from the Order and it became final thirty (30) days after June 6, 1984.

The appellants, or their predecessors in interest, elected not to take the risk of drilling the initial well under Order No. 260474, choosing alternatives of cash bonus and/or excess royalty. (R. at 580-582; 868 — Exhibit No. 83; 869 — Exhibit No. 84.) Inexco commenced the initial unit well within the 180-day term provided in the Order, and completed it in the Des Moines common source of supply. (R. at 842 — Completion Report.)

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[13] References to the record before the Appellate Courts of Oklahoma are cited as "R. at —."

After Viersen elected to take a cash bonus of $199,375.00, it purported to lease its interest in Section 23 to Nova Energy Corporation ("Nova"). Nova assigned a portion of that interest to Verlan Harrell, Richard D. Veal, James H. Kuhlman, David M. Pulling, Greenleaf Energy Company, Raymond Shipley and Smack Dab, Ltd. (R. at 530-532; 552-554; 556-557 and 588-590.)

Subsequently, Ward filed a pooling application in Cause CD No. 122874 in connection with a proposed increased density well in Section 23. Inexco protested that application, arguing that the original pooling order was a unit pooling. Ward, supported by Greenleaf Energy Company, Nova Energy Corp., David M. Pulling, James E. Kuhlman and Thomas Wygant, argued that such Order was wellbore in scope. The Ward group wanted new elections for the second well.

The Initial Hearing Officer ruled in Ward's favor citing Policy No. 45 as the primary consideration. The Commission upheld the Hearing Officer and issued Order No. 277146 on April 25, 1985. Order No. 277146 re-pooled Section 23 and gave new elections to all respondents.

Inexco appealed Order No. 277146 to the Supreme Court of Oklahoma. Ward, Nova, Greenleaf, Wygant, Pulling and Kuhlman opposed Inexco in the appeal.

On July 6, 1988, the Supreme Court of Oklahoma issued an opinion in the appeal by Inexco. In *Inexco Oil Company v. Oklahoma Corp. Com'n,* 767 P.2d 404 (Okl. 1988), cert denied 490 U.S. 1040, 109 S.Ct. 1943, 104 L.Ed. 2d 414 (1989), the Court reversed Commission Order No. 277146, holding that the original pooling order was a unit pooling. The Court held the election not to participate in the initial well divested the

Appellants of their working interest[14] in Section 23. Order No. 277146 was determined to be an impermissible collateral attack on the original order.

A Petition for Writ of Certiorari was filed with this Court by the Petitioners. The Petition claimed that insufficient notice had been given of the unit nature of the original pooling order. In addition, the Petitioners claimed to have been misled by the combination of Policy No. 45 and the express terms of the original pooling order. (R. at 870 — Exhibit No. 85.)

On April 24, 1989, the Court denied the Petition for Writ of Certiorari. On May 8, 1989, the Oklahoma Supreme Court ordered that mandate issue in the Inexco appeal. On August 25, 1989, the Application in Cause CD No. 149617 was filed. After entry of Order No. 358995 an appeal was filed with the Supreme Court of Oklahoma. The appeal was assigned to the Court of Appeals, Division III. That Court upheld the Commission Order. The Supreme Court of Oklahoma thereafter refused to review the decision of the Court of Appeals.

SUMMARY OF ARGUMENT

I. The Issues Presented For Consideration By The Petitioners Do Not Raise Federal Questions

A) The record of this case reveals that the Petitioners were not deprived of due process rights guaranteed by the Fourteenth Amendment.

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[14] The term "working Interest" is defined in H. Williams and C. Meyers, *Oil and Gas Terms* (7th Ed. 1987) as "the operating interest under an oil and gas lease. The owner of the working interest has the exclusive right to exploit the minerals on the land." As noted therein:

> In the simple situation of a lessor who executes a lease, reserving 1/8th royalty, to a lessee who creates no burden on his estate, the working interest consists of 7/8th of production subject to all costs of exploration and development.

1) The property rights relinquished by the Petitioners by virtue of their election not to participate in the initial unit well were transferred to the Respondent under the original pooling order.

2) Neither Petitioners, nor their predecessors, appealed the original pooling order despite having been given notice of the hearing which preceded its entry.

3) The failure of the Petitioners to appeal the original pooling order permanently foreclosed their ability to attack the effect of such order upon their oil and gas property interest.

4) This appeal is a continued attempt to collaterally attack the original pooling order.

B) The notice which preceded the entry of the original pooling order was proper in all respects.

1) All parties to be subjected to the original pooling order were given ample opportunity to appear at an evidentiary hearing and present evidence in opposition to the relief requested.

2) The Petitioners, or their predecessors in title, actually appeared at the hearing and offered evidence in opposition to the requested relief.

3) A party electing in response to the original pooling order was on notice of the potential construction of state law so as to yield unit pooling.

C) The Petitioners are precluded by the doctrines of "Res Judicata" and "Estoppel by Judgment" from arguing the issues of insufficient notice, or reliance.

D) The claims raised by the Petitioners have previously been argued to this Court and denied.

E) The issues of reliance raised in the Petition for a Writ of Certiorari form no basis for granting such Petition.

ARGUMENT

This Court should deny the Petition for A Writ of Certiorari filed herein. The ruling of the Oklahoma Supreme Court does not decide a federal question. Obviously, such ruling does not conflict with decisions of another state court of last resort, or of a federal court of appeals. Finally, the ruling does not decide a federal question in a way in conflict with applicable decisions of this Court.

The Court of Appeals, Division III, of the State of Oklahoma, affirmed the order of the Commission denying an application to vacate a final order of that administrative body. That court correctly decided that the Petitioners were barred by issue preclusion doctrines from obtaining such relief. The Court of Appeals also affirmed the Commission finding that the evidence presented by Petitioners failed to prove either the existence of misleading notice relative to entry of the original pooling order, or that the Petitioners were misled by that notice.

PROPOSITION I

THE WRIT SHOULD BE DENIED BECAUSE THE PETITIONERS WERE NOT DEPRIVED OF THEIR RIGHT TO PROCEDURAL DUE PROCESS.

As decided by the Oklahoma Supreme Court in *Inexco*, supra, a relinquishment of Petitioners' property rights took place upon expiration of the election period provided in the original pooling order. That order was issued after notice and a hearing upon the application of Inexco Oil Company. The Petitioners, or their predecessors in title, were given notice of that hearing and were represented by counsel at the hearing.[15] The Petitioners did not appeal the original

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[15] See Ex. 32; R. 142, 117.

pooling order, and it became final. Inexco Oil Company was designated as operator of the drilling and spacing unit and the common sources of supply described in said order.

The record establishes that the Petitioners have never requested an amendment of the original order to remove Inexco as operator, or to limit the scope of rights covered thereby. No party ever presented, or attempted to present, testimony which would support the requisite change in knowledge of condition upon which such amendment could be based. Without that evidence, the Oklahoma Corporation Commission was powerless to amend the order. *Marlin Oil Corporation v. Corporation Commission,* 569 P.2d 961 (Okl. 1977). If the Petitioners felt there was effected a deprivation of rights by the original pooling order, it was incumbent upon the Petitioners to appeal that order and prevent it from becoming final. *Nilsen v. Ports of Call Oil Co.,* 711 P.2d 98, 102 (Okl. 1985).

The Petitioners do not argue that the original pooling order was ambiguous. Rather, they purportedly relied upon their personal construction of the language of the order as "notice" of the order's intent in making their decision not to participate. Thereafter, when the Oklahoma Supreme Court ruled the order to be unit in scope the Petitioners argue they were unconstitutionally misled.

PROPOSITION II

THIS WRIT SHOULD BE DENIED BECAUSE THE NOTICE WHICH PRECEDED THE ENTRY OF THE ORIGINAL POOLING ORDER WAS PROPER IN ALL RESPECTS.

The Petitioners allege that their rights of procedural due process were violated by the entry of the original pooling order. This contention is based upon a claim that the "notice" given in Cause CD No. 108567

was misleading. Using that conclusion as foundation, the Petitioners construct an argument that the Commission lacked "jurisdiction" to enter a pooling order affecting unit rights in Section 23.[16] However, the facts stated to support the claim of misleading notice do not relate to the concept of notice. More importantly, the actual notice given in Cause CD No. 108567 was proper in all respects.

SUBPROPOSITION A:

NEITHER THE LANGUAGE OF ORDER NO. 260474, NOR POLICY NO. 45, ARE TO BE CONSIDERED "NOTICE" FOR PURPOSES OF CAUSE CD NO. 108567.

An often quoted definition of procedural due process of law is that stated by Daniel Webster in the argument he made to the Court in the Dartmouth College Case[17] wherein he asserted that by such term is meant "a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." Succinctly stated, this concept of procedural due process relates to the required proceedings which lead to a deprivation of life, liberty, or property.

The Oklahoma Supreme Court has recognized that before a person may be deprived of a property right by Commission order that person must be given notice of the proceedings against him and must be given an opportunity to defend himself in a hearing. See *Union*

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[16] This is a curious argument in light of Petitioners' apparent admission that Order No. 260474 was held to be a "unit" order by the Oklahoma Supreme Court in *Inexco Oil Company v. Oklahoma Corp. Com'n*, 767 P.2d 404 (Okl. 1988), cert denied 490 U.S. 1040, 109 S.Ct. 1943, 104 L.Ed.2d 414 (1989), a position contrary to that argued to the Commission in the proceedings below. In the introduction of their Brief in Chief to the Oklahoma Supreme Court the Petitioners state "this appeal is not an attempt to revisit the unit vs. wellbore pooling dispute . . ."

[17] *Dartmouth College v. Woodward*, 4 Wheat (US) 518, 4 L.Ed. 629.

Texas Petroleum, a Division of Allied Chemical Corporation vs. Corporation Com'n, 651 P.2d 652 (Okl. 1982).

The Petitioners' attack upon the Court of Appeals decision upholding the original pooling order hides behind the guise of a contention that they were unfairly deprived of property rights in Section 23 by virtue of a lack of knowledge of the unit nature of that pooling order. This approach was required because the order is final and unappealed. In Oklahoma, delayed attacks upon final Commission orders, whether collateral or direct, are limited to proceedings which allege either jurisdictional deficiency or the existence of extrinsic fraud in the procurement of the order.[18] See 52 Okla. Stat. Ann. 1981, §112; *Crest Resources v. Corporation Commission,* 617 P.2d 215, 218 (Okl. 1980); and, *State v. Corporation Com'n,* 590 P.2d 674, 677 (Okl. 1979). See also Morgan, *Delayed Attacks on Final Judgments,* 72 Okl.L.Rev. 45 (1980).

The Petitioners do not cite any defect in the actual Notice of Hearing filed and published in Cause CD No. 108567. Rather, the Petitioners manufacture a new definition of "notice" and assert that Policy No. 45 and the original pooling order itself fall within that term. There is no merit in that contention.

All of the cases cited by the Petitioners as precedent for their proposition discuss the requirement of notice in advance of a hearing. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed.2d 865 (1950), a cornerstone case for Petitioners, dealt with consideration of the sufficiency of notice given to parties potentially affected by a hearing to be conducted after the date of notification. *Mullane* con-

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[18] The Appellants are not pursuing in this Petition the issue of fraud in the procurement of Order No. 260474. The sole issue offered in support of the effort to overturn the decision below is deficiency of notice.

forms to the well settled rule that notice serves the purpose of providing advance warning of scheduled court proceedings so that a reasonable opportunity to prepare will be afforded. See *Re: Application of Gault*, 387 U.S. 1, 18 L.Ed.2d 527, 87 S.Ct 1428 (1967).

The remaining cases cited by Petitioners as supportive of their claim of a due process violation are not persuasive. In *Doston v. Duffy*, 732 F.Supp. 857 (N.D. ILL. 1988) the notice was ruled deficient because it failed to incorporate specific provisions required by Federal Regulations. In *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978) the parties affected by an agency's order terminating services were not informed of their opportunity to protest the proposed termination.

As set forth above, the notice preceding the original pooling order clearly complied with oil and gas conservation laws of Oklahoma. That notice unambiguously informs the affected parties of their right to appear and object to the requested relief.

Policy No. 45 was signed by the Commission on May 3, 1984, without any advance public knowledge. (R. at 362-363.) The hearing which led to the original pooling order had already taken place on April 20, 1984. The Application and original Notice in Cause CD No. 108567 had been filed September 20, 1983. The Amended Notice was filed on September 26, 1983. It was the original and amended notice which advised interested parties of the pending pooling and adjudication of rights by the Commission. On the date of the issuance of Policy No. 45 the Petitioners, or their predecessors, had already been subjected to the jurisdiction of the Commission and brought before that body for the hearing.

A review of the face of the proceedings in Cause CD No. 108567 reveals the original and amended Notices of Hearing. Such a review does not yield evi-

dence of Policy No. 45. Nothing in the application, notice, service of process, or order filed in the Cause refers to that Policy. The Petitioners interjected Policy No. 45 in this Petition by reference to testimony given to the Commission. That policy is not to be considered notice given in anticipation of the hearing provided to Petitioners.

The Petitioners also claim that the original pooling order itself acts as "notice" of the proceeding in Cause CD No. 108567. However, as with Policy No. 45, the entry of the order on June 6, 1984 followed both the date actual notice was given in the Cause, and the date of the hearing to which the notice applied. Clearly, the order does not impact upon the Commission's acquisition of jurisdiction over either the parties notified of the hearing, or over the subject mater of the Cause.

In addition, the original pooling order never refers to Policy No. 45, either expressly or implicitly. The relationship between the Order and Policy No. 45 suggested by Petitioners was again supplied by extrinsic evidence in the form of testimony by individuals whose own "interpretation" of the Order incorporated the policy.

The Petitioners are wrong in their assertion that Policy No. 45 and the original pooling order can form a basis for misleading notice. Neither the Policy, nor the Order, relate to the issues properly considered in this appellate review.

SUBPROPOSITION B:

THE NOTICE WHICH PRECEDED THE HEARING IN CAUSE CD NO. 108567 WAS PROPER IN ALL RESPECTS.

The Petitioners argue that the notice preceding the hearing in Cause CD No. 108567 was not specific enough to forewarn them of the entry of a unit pooling order. This argument misconceives the purpose of notice.

In a Commission proceeding procedural due process creates the obligation of proper service of process and requires notice of the nature of the hearing and an opportunity to be heard. See *Union Texas Petroleum, a Division of Allied Chemical Corporation v. Corporation Com'n,* 651 P.2d 652 (Okl. 1982).

It is undisputed in this Cause that the Petitioners, or their predecessors, were properly served with notice of the hearing to be conducted in Cause CD No. 108567. That notice clearly set forth the hearing date; notified the respondents of their opportunity to be heard; and, most importantly, told them that there was being sought an order adjudicating their rights and equities, and pooling their oil and gas interests in Section 23. (R. at 831 — Exhibit 45 — Amended Notice and Order Referring and Setting Cause for Hearing.) It cannot be contended such notice was misleading.

In *Morgan v. United States,* 304 U.S. 1 (1934), this Court held that the notice of hearing before an administrative body must not be too broad and general, and must apprise the parties of what will occur at the hearing. Further, in *Butland v. Bowen,* 673 F. Supp. 638 (D. Mass. 1987), the District Court ruled that a notice which falsely notified claimants of the ramifications of a statute was misleading and insufficient to vest an adminstrative agency with personal jurisdiction. The notice given in Cause CD No. 108567 when viewed in light of such rulings is not misleading.

52 O.S. 1981 §87.1(e) authorizes the Commission to conduct hearings for the purpose of pooling severally owned tracts within a drilling and spacing unit. The Commission is directed by that statute to issue orders which adjudicate the rights and equities of such owners on terms found by the Commission to be just and reasonable.

The notice of hearing in Cause CD No. 108567 spoke directly to what the statute authorized. Any

party reading its contents would be apprised of a hearing intended to result in a pooling order which would adjudicate rights and equities of owners on the exact terms allowed by the statute. Nothing within the notice could be categorized as false, or misleading.

PROPOSITION III

THE PETITIONERS ARE PRECLUDED BY THE DOCTRINES OF "RES JUDICATA" AND "ESTOPPEL BY JUDGMENT" FROM AGAIN ARGUING THE ISSUES OF INSUFFICIENT NOTICE, OR RELIANCE.

The Application in Cause CD No. 149617 sought to vacate or modify the original pooling order based upon a claim that Policy No. 45 gave "notice" that elections under the order would only affect rights within the initial wellbore covered thereby. In that same application Petitioners sought identical relief by claiming that the notice given prior to the hearing in Cause CD No. 108567 was constitutionally deficient. To the extent that the Petitioners rely upon such issues, they are precluded from presenting those claims by recognized principles of "res judicata" and "estoppel by judgment."

In *Brown v. Briggs*, 292 P.2d 385 (Okl. 1956), the Court stated the elements of those doctrines as follows:

> "[Res Judicata] bars a second suit between the same parties on the same subject matter resolving the same issues between the parties in the same capacity. Estoppel by judgment is limited to issues common to difference actions which were expressly, or by necessary implication, adjudicated in the first action or judgment." *Brown*, 292 P.2d at *387*.

All of the Petitioners, or their predecessors in title, were parties to a previous action covering Section 23 which began at the Commission and was ap-

pealed to the Oklahoma Supreme Court. In Cause CD No. 122874, Ward Petroleum Corporation filed a pooling application covering the same common sources of supply named in Order No. 260474. Inexco Oil Company, the predecessor of Respondent, opposed that application before the Commission. One of the primary issues in that Cause was the effect of Policy No. 45 on Order No. 260474. Another of the contentions was that the notice in Cause CD No. 108567 was too narrow to allow unit pooling. Order No. 277146, as issued in Cause CD No. 122874, was predicated upon a Hearing Officer's Report which specifically cited the Policy Statement as the basis of recommendation of Ward's application. The commission adopted that report and refused Inexco's argument that the policy statement was an unauthorized action. (R. at 847 — Order No. 277146.)

Inexco appealed Order No. 277146 to the Oklahoma Supreme Court in Case No. 64,455. As is evidenced by the briefs from that appeal submitted as exhibits of Respondent in the hearing for the Cause leading to this Writ, the Petitioners considered the effect of the policy statement one of the essential issues on appeal. (R. at 870 — Exhibit No. 85.) Typical of the parties' position is the statement of Nova Energy Corporation in its Brief in Opposition to Consolidation filed in the appeal on January 21, 1986:

> "In Appeal Nos. 61,029, 61,179 and 61,820, the Appellants in each case are attempting to overturn a finding by the Corporation Commission that an initial forced pooling for the first well on a unit, effectively forced (sic) pooled all subsequently drilled wells in the same unit. Each of the Corporation Commission orders in question in those appeals were issued prior to the Statement of Policy No. 45 issued by the Corporation Commission. Therefore, in those appeals Statement of Policy No. 45 is not

an issue. *In appeal No. 64,455 the Statement of Policy No. 45 is a major issue."* (Emphasis added.)

In its response to a Motion for Summary Disposition, filed in the Supreme Court of Oklahoma, Ward was attempting to distinguish the issues on appeal from existing precedent. In Paragraph 13(b) of that Response Ward stated:

"In the instant case, the non-operators had every right to and did make elections relying upon the belief that the initial order covered a single well. *This reliance was supported by the language of the order and the OCC statement of policy."* (Emphasis added.)

The Petitioners continued to argue throughout the appeal that the notice provided in Cause CD No. 108567 did not meet minimum standards of due process. They asserted that the notice was not specific enough concerning rights to be relinquished by a respondent who elects not to participate in the unit well.

After the Supreme Court of Oklahoma issued the decision in Case No. 64,455 Petitions for Rehearing were filed. In the Petition of Greenleaf Energy Corporation, Thomas G. Wygant, David M. Pulling and James E. Kuhlman and Petitioners stated in support thereof as follows:

"Due process requires that owners of property be given notice reasonably calculated to apprise them of an adjudicative proceedings which substantially affects their constitutionally protected property interests. In the instant case, Appellees were notified by Policy Statement No. 45 and the express terms of Order No. 260474 that respondents electing not to participate in the drilling of the Wolfe No. 1-23 well would relinquish to Inexco only their

> rights in and to the proposed well. Appellees were never notified that their failure to participate in the drilling of the Wolfe No. 1-23 well would result in the relinquishment of all rights in the entirety of the unit." (R. at 980 — Exhibit No. 85.)

Following an adverse decision by the Oklahoma Supreme Court, the Petitioners, with other parties, jointly filed a Petition for Writ of Certiorari to the Oklahoma Supreme Court with this Court. In that Petition the main arguments of the Petitioners were those alleged in this Cause. The Petition states in Proposition II thereof as follows:

> "The First Order — together with Policy Statement No. 45 — gave clear notice to Petitioners that the First Order had only a well-bore scope, so that an election not to participate would *not* prejudice Petitioners' ability to exploit their leaseholds through participation in later wells to be drilled in the unit. Acting on this notice, Petitioners made an opt-out election under the first order." (R. at 870 — Exhibit No. 85.)

The foregoing clearly illustrates that both this Court and the Supreme Court of Oklahoma were squarely presented with the very issues concerning the policy statement and notice raised in the application filed in Cause CD No. 149617, and asserted as a basis for granting the Writ of Certiorari filed in this case. Those issues were presented in a prior action, the subject matter of which included the original pooling order. Obviously, the opinion rendered by the Supreme Court of Oklahoma in that appeal, as reported in *Inexco,* supra, rejected the Petitioners' arguments. This court refused to review that decision. The Petitioners cannot now revisit those issues.

Moreover, even if the Petitioners were to contend that the issues in this appeal which relate to the policy

statement and notice are in some manner different from those argued in Case No. 64,455, they are still prevented from now asserting such issues. The doctrine of res judicata as defined by the Oklahoma Supreme Court forms a barrier to an offer of evidence intended to address an issue which *could* have been presented in the prior action. As noted in *Morrison v. Board of Ed. of Independent School District No. 6 of Craig County,* 424 P.2d 963 (Okl. 1967) the final judgment of a court of competent jurisdiction is conclusive between the parties or their privies in a subsequent action involving the same subject matter, not only as to all matters actually litigated and determined in prior action but also as to all matters germane to issues which could or might have been litigated therein. See also *Dierks v. Walsh,* 165 P.2d 354 (Okl. 1946).

For the same reasons stated above, the Petitioners are barred from relitigating the issue of the effect of Order No. 260474. The record and briefs filed in the appeal which resulted in *Inexco,* supra, clearly show such issue to have been argued, considered and decided by the Court. (R. at 870 — Exhibit No. 85.)

The Petitioners argue that the principles announced in *Hansberry v. Lee,* 311 U.S. 32 (1950) and *Commissioner of Internal Revenue v. Sunnen,* 333 U.S. 591 (1948) prohibit the application of the doctrines of res judicata and collateral estoppel against them simply because there has been a constitutional violation asserted. That is a misstatement of the meaning of the opinions rendered in those cases.

In *Hansberry* the Court refused to allow the holding in prior litigation to be used as a bar to the Petitioners claim because that Petitioner was not a party to the prior proceeding. The Court, in fact, recognized that issue preclusion doctrines can be given effect in the face of constitutional violations. However, in such instances there should be precise

compliance with all elements of the doctrines. The Petitioners herein do not contend they, or their predecessors, were not parties to the prior litigation.

In *Sunnen*, the Court rejected the lower court's application of the doctrines because the second action was upon a different Cause than the first. As a result the Court concluded the parties had not been given the opportunity to litigate the issues argued in the second Cause. In this case, the precise points argued in support of the petition for a Writ of Certiorari were raised in the prior proceeding. The "intervening" circumstances alleged to bring this case under the rationale of *Sunnen* took place long before the litigation which resulted in the first ruling. Policy No. 45 was issued well before the date of the second pooling order which was litigated upon to this Court in *Inexco*, supra.

PROPOSITION IV

THE ISSUES RAISED IN THE PETITION FOR A WRIT OF CERTIORARI FOUNDED ON ALLEGED RELIANCE UPON BOTH STATEMENT OF POLICY NO. 45 AND PETITIONERS' INTERPRETATION OF THE ORIGINAL POOLING ORDER FORM NO BASIS FOR GRANTING THE REQUESTED RELIEF.

The Application in Cause CD No. 149617, and the evidence presented in support thereof, are replete with reference to acts of reliance by all Petitioners except Viersen. Some of the Petitioners claim to have believed that an election not to participate in the risk of drilling the initial unit well would not affect their working interest within subsequent wells. Allegedly, those Petitioners relied upon Policy No. 45, and upon use of the word "well" within the original pooling order, to come to such a conclusion. Even if taken as true, those assertions cannot result in the granting of this Petition.

SUBPROPOSITION A:

ANY RELIANCE OF PETITIONERS UPON POLICY NO. 45 WAS UNFOUNDED AND CANNOT FORM THE BASIS FOR A CHANGE IN ELECTIONS UNDER ORDER NO. 260474.

Arguably, an administrative agency may interpret a statute. However, the statute must be ambiguous to justify the agency's interpretation. *Cullinan v. McColgan,* 183 P.2d 115 (Cal. Ct. App. 1947). In Policy No. 45 the Commission claimed that there was a need for interpretation of 52 O.S. 1981, §87.1(e). That claim is clearly erroneous. The Oklahoma Supreme Court has held that the provisions of 52 O.S.A. 1981 §87.1(e) are clear and unambiguous. *Ranola Oil Company v. Corporation Commission of Oklahoma, et al.,* 752 P.2d 1116 (Okl. 1988); See also *Amoco Production Company v. The Corporation Commission of Oklahoma,* 751 P.2d 203 (Okl. Ct. App. 1986) and *Amoco Production Company v. Corporation Com'n,* 752 P.2d 835 (Okl. App. 1987).

Further, the Commission may not change the statute through its interpretation thereof. Any such interpretation which would give to the Commission authority in excess of that granted by the statute must be ignored. *Emery Mining Corporation v. Secretary of Labor,* 744 F.2d 1141 (10th Cir. 1984).

No party has the right to claim reliance upon a defective rule, regulation or policy of an administrative agency. In *Enfield v. Kleppe,* 566 F.2d 1139 (10th Cir. 1977) the Court was considering a party's claim of reliance upon an invalid regulation. The Court refused such defense and said:

> "Since the defective regulation was never valid, there was no right to rely on it. See *Dixon v. United States,* 381 U.S. 68, 73, 85 S. Ct. 1301, 14 L. Ed. 2d 223 (1965), *Atlantic Richfield Co. v. Hickel,* supra."

A similar pronouncement was made in *Saint Francis Memorial Hospital v. United States,* 648 F.2d 1305, 227 Ct.Cl. 307 (Ct.Cl. 1981) in which the Court stated that reliance on one's own interpretation of an imprecise regulation does not create an entitlement based on that interpretation, or a violation of due process, when the regulator or court adopts another ruling.

The Court of Appeals of the State of Oklahoma in *Amoco Production Company v. Corporation Com'n,* 752 P.2d 835 (Okl. App. 1987) found that Policy No. 45 represents "an arbitrary and erroneous interpretation of 52 O.S., Section 87.1." The Court found that only the legislature could change the statute and give the Commission authority to pool by the wellbore. Given such fact, no party can successfully assert a right to rely upon the policy.

In this Cause Respondent established that it had correctly interpreted the statute and had chosen to ignore the erroneous interpretation given by the Commission in Policy No. 45. (R. at 578-579; 598-600.) It would be patently unfair to punish Respondent for its correct interpretation of law by accepting the argument of the Petitioners.

The Petitioners argue that Policy No. 45 had the effect of a rule. They presented testimony to the Commission of Robert Goldfield, the original drafter of the policy, to support such claim. (R. at 333-304.) However, when the Policy Statement issued on May 4, 1984, both the controlling statute and Commission rule clearly prescribed a procedure to be followed for rulemaking. 52 O.S. 1980, Section 97 and Rule 12 of the OCCRP both dictated filing of an application, publication of a notice of hearing and a formal hearing prior to implementation of a rule. Mr. Goldfield acknowledged that those procedures were not followed prior to issuance of Policy No. 45. The Commission failed to abide by either the statute, or its own rules.

Whether characterized as an attempt at interpretation of the statute, or as a Commission rule, the Policy No. 45 is clearly erroneous and any party's reliance thereon was unjustified.

SUBPROPOSITION B

THERE WAS NO EVIDENCE OF RELIANCE BY VIERSEN OIL AND GAS COMPANY UPON EITHER POLICY NO. 45 OR THE ORIGINAL POOLING ORDER.

Viersen was a named respondent in Cause CD No. 108567. It was the owner of 159.5 net mineral acres in Section 23. Viersen appeared at the hearing in the Cause on April 20, 1984. The original pooling order was issued by the commission on June 6, 1984, providing Viersen 15 days from that date to elect among the fair market value alternatives. Viersen made the election for cash bonus and relinquished its working interest to Inexco. Not until much later, on January 28, 1985, did Viersen purport to lease its working interest in Section 23 to Nova Energy Corporation. (R. at 860 — Exhibit No. 75.)

At the hearing before the Commission in Cause CD No. 149617 there was never presented any evidence to establish that Viersen relied upon either Policy No. 45, or the use of the word "well" in connection with the original pooling order, in making an election under that Order.

Petitioners try to hide this evidentiary deficiency relating to Viersen by reference to the reliance of the Petitioners as a group. The record only reflects attempts by the successors to Viersen to assert reliance upon Policy No. 45 or the original pooling order. (R. at 400.) Any such reliance by those parties is not relevant to this Petition. Once Viersen elected not to participate in the initial well to be drilled under the order, its working interest vested in Inexco. See *Inexco,*

supra. The acts of Viersen's successors subsequent to the expiration of the 15-day election period cannot divest such rights.

Even if this Court were to conclude that the alleged acts of reliance form a basis for the requested relief, such conclusion would leave unaffected the rights relinquished by Viersen.

RELIEF REQUESTED AND CONCLUSION

In view of the foregoing, further review of this action is unwarranted. This Court should deny the Petition based upon the fact that the Petitioners fail to show any defect in the notice preceding entry of the original pooling order. Just as important, the Petitioners have argued the same claims in prior actions and are now precluded from relitigating those issues again. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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